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GROH V. RAMIREZ: STRENGTHENING THE FOURTH AMENDMENT PARTICULARITY REQUIREMENT, WEAKENING QUALIFIED IMMUNITY

I. INTRODUCTION

If there is one conclusion that legal scholars seem to agree on regarding Fourth Amendment law, it is that the law is a “mess.”¹ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²

The basic purpose of the Fourth Amendment is “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”³ The amendment generally requires that searches and seizures be reasonable and that warrants meet specific requirements.⁴ The simplicity of the Fourth Amendment, however, ends there.

1. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 800 (1994) [hereinafter Amar, *First Principles*] (“[M]y aim here is to provide a way out of the mess that is the current Fourth Amendment.”); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329 (1973) (“The fourth amendment cases are a mess!”); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 20 (1988) (“[T]here is virtual unanimity . . . that the Court simply has made a mess of search and seizure law.”). Even Supreme Court Justices have commented on the confusion surrounding the Fourth Amendment. See, e.g., *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973) (Rehnquist, J.) (“[T]he decisions of this Court dealing with the constitutionality of warrantless searches . . . suggest that this branch of the law is something less than a seamless web.”); *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring) (“The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth.”).

2. U.S. CONST. amend. IV.

3. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

4. See U.S. CONST. amend. IV; *United States v. Knights*, 534 U.S. 112, 118 (2001) (“The touchstone of the Fourth Amendment is reasonableness . . .”); *Atwater v. City of*

First, the Supreme Court of the United States has not always been clear in defining when a search without a warrant is inherently unreasonable.⁵ Second, when the courts deem a warrant necessary, they have sometimes struggled to define what makes a warrant valid, especially regarding the particularity requirement.⁶ Finally, when a warrant fails and the search is deemed unconstitutional, there has been confusion when determining whether the officer conducting the search is entitled to qualified immunity.⁷

Recently, in *Groh v. Ramirez*,⁸ the Supreme Court examined whether the mistaken omission in a warrant of a description of the particular things to be seized made an otherwise valid search unconstitutional, and, if so, whether the executing officer would then be entitled to qualified immunity.⁹ Part II of this note provides a brief history of the warrant requirement, the particularity requirement, and qualified immunity. Part III discusses the factual and procedural history, as well as the holding, of *Groh*. Part IV analyzes the majority and dissenting opinions of *Groh*. Finally, Part V discusses the potential impact of the *Groh* decision.

Lago Vista, 532 U.S. 318, 360 (2001) (O'Connor, J., dissenting) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (per curiam) (“[T]he touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”)).

5. Compare *Harris v. United States*, 331 U.S. 145, 155 (1947) (allowing warrantless search incident to arrest, as long as reasonable), and *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950) (overruling *Trupiano v. United States* and returning to reasonableness standard), with *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (requiring warrant for searches incident to arrest where reasonably practicable), and *Chimel v. California*, 395 U.S. 752, 768 (1969) (overruling *Harris* and *Rabinowitz* and returning to the *Trupiano* standard requiring a warrant for searches incident to arrest where reasonably practicable).

6. Larry EchoHawk & Paul EchoHawk, *Curing a Search Warrant that Fails to Particularly Describe the Place to Be Searched*, 35 IDAHO L. REV. 1, 3 (1998). The particularity requirement of the Fourth Amendment warrant clause requires the warrant to “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

7. See *infra* Part II.C.2. Qualified immunity provides certain protection to a government officer against civil actions brought against the officer by citizens whose constitutional rights have allegedly been violated by the officer. See *infra* Part II.C.

8. 124 S. Ct. 1284 (2004).

9. *Id.* at 1287.

II. HISTORY

A. The Warrant Requirement

While the idea that a person's home should be protected against arbitrary invasion dates back to biblical times,¹⁰ and the idea that citizens should be protected against unreasonable searches and seizures was well established in England by the end of the seventeenth century,¹¹ there has been much scholarly debate as to whether early common law or the Fourth Amendment provided that warrantless searches were inherently unreasonable.¹² Such debate aside, it is clear that the Supreme Court of the United States in the last fifty years has established a "strong preference for searches conducted pursuant to a warrant."¹³ According to the Court, requiring a warrant serves the dual purpose of ensuring through judicial approval that an objective mind weighs the need to invade someone's privacy "in order to enforce

10. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13-14 (1937); William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, at xcii-c (reprint 1997 by Univ. Microfilms Int'l) (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (providing a comprehensive discussion regarding the origin and emergence of the right to privacy in the home, beginning in biblical times until its adoption in 1791); see also Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 U. RICH. L. REV. 278 (1969) (tracing the history behind the Fourth Amendment, beginning in medieval times).

11. See Cuddihy, *supra* note 10, at 47-48.

12. Akhil Reed Amar and Tracey Maclin have engaged in a robust, contemporary debate regarding whether the Fourth Amendment demands, or whether search and seizure law predating the Fourth Amendment ever demanded, that a warrant be required in order for searches and seizures to be reasonable. Compare Amar, *First Principles*, *supra* note 1, at 761-81 (asserting that the Fourth Amendment does not require a warrant, even presumptively), and Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 72-75 (1996) [hereinafter Amar, *Boston*] (rebutting Maclin's assertion in *When the Cure for the Fourth Amendment is Worse Than the Disease* that a "warrant preference" rule exists), with Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 6-13 (1994) [hereinafter Maclin, *Cure*] (rebutting Amar's assertion in *First Principles* that the Fourth Amendment does not require a warrant), and Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 930-38, 950-59 (1997) [hereinafter Maclin, *Complexity*] (rebutting Amar's proposition in *First Principles* that the Fourth Amendment does not require a warrant and Amar's proposition in *The Fourth Amendment, Boston, and Writs of Assistance* that the Fourth Amendment does not include a "warrant preference").

13. *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)); see also Amar, *First Principles*, *supra* note 1, at 801 (commenting on the Court's "obsession" with warrants and probable cause).

the law,"¹⁴ and "assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer."¹⁵

The Supreme Court has traditionally held that, absent exigent circumstances or consent, a warrantless entry is unconstitutional.¹⁶ This is especially true when the search involves a person's home, as freedom from unreasonable governmental intrusion in one's home goes to "the very core" of the Fourth Amendment.¹⁷ A number of exceptions to the rule that warrantless entries are unconstitutional, however, do exist, including automobile searches,¹⁸ searches incident to arrest,¹⁹ and administrative searches of "closely regulated" businesses,²⁰ among others.²¹

B. *The Particularity Requirement*

1. Overview of the Particularity Requirement

While scholars may still debate whether a warrant is necessary to satisfy the Fourth Amendment,²² the text of the amendment makes clear that a warrant may not be issued unless it "particularly describ[es] the place to be searched, and the persons or

14. *McDonald v. United States*, 335 U.S. 451, 455 (1948).

15. *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 532 (1967)).

16. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Chimel v. California*, 395 U.S. 752, 761 (1969); *Johnson v. United States*, 333 U.S. 10, 14–15 (1948); *McDonald*, 335 U.S. at 454.

17. *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also *Kyllo*, 533 U.S. at 31 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."); *Payton v. New York*, 445 U.S. 573, 586 (1980) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)). ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.")

18. See *United States v. Johns*, 469 U.S. 478, 487–88 (1985).

19. *Chimel*, 395 U.S. at 762–63.

20. *New York v. Burger*, 482 U.S. 691, 702 (1987).

21. The Supreme Court has allowed warrantless searches in a variety of other circumstances. See, e.g., *United States v. Drayton*, 536 U.S. 194, 201 (2002) (consent searches); *California v. Carney*, 471 U.S. 386, 393 (1985) (motor home searches); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (border searches); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (exigent circumstances).

22. See *supra* note 12 and accompanying text.

things to be seized.”²³ This particularity requirement serves to prevent general searches²⁴ and assures the subject of the search of the *limits* of the authority of the executing officer.²⁵ “[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement . . . is unconstitutional.”²⁶ Generally, the warrant must be particular enough to “make[] general searches under them impossible and prevent[] the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.”²⁷

2. Curing a Search Warrant Lacking Particularity

While the Supreme Court has been clear that a warrant lacking particularity is unconstitutional, the Court has not clarified the precise circumstances under which a warrant lacking particularity can be cured.²⁸ All jurisdictions have held a warrant lacking particularity to be valid where an affidavit particularly describing the things to be searched or seized is explicitly incorporated by reference in *and* physically attached to the warrant.²⁹ Some jurisdictions have only required that the affidavit be incorporated by reference in *and accompany* the warrant,³⁰ while others have simply allowed for either incorporation by reference *or* attachment.³¹

23. U.S. CONST. amend. IV. See LASSON, *supra* note 10, at 51–78, and Cuddihy, *supra* note 10, at 1002–181, for a description of the important events in the few decades leading up to the adoption of the particularity requirement in the Fourth Amendment.

24. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

25. *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

26. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984); *see also* *Stanford v. Texas*, 379 U.S. 476, 485–86 (1965).

27. *Stanford*, 379 U.S. at 485 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

28. *EchoHawk & EchoHawk*, *supra* note 6, at 14.

29. *Id.* at 15; *see, e.g.*, *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir. 1993) (requiring incorporation by reference and attachment). All jurisdictions except for the Tenth Circuit, however, impose a lower standard. *EchoHawk & EchoHawk*, *supra* note 6, at 15.

30. *See, e.g.*, *Bartholomew v. Pennsylvania*, 221 F.3d 425, 428 (3d Cir. 2000); *United States v. McGrew*, 122 F.3d 847, 849 (9th Cir. 1997); *United States v. Nelson*, 36 F.3d 758, 760 (8th Cir. 1994); *United States v. Dale*, 991 F.2d 819, 847–48 (D.C. Cir. 1993); *United States v. Morris*, 977 F.2d 677, 681 n.3 (1st Cir. 1992).

31. *See, e.g.*, *United States v. Shugart*, 117 F.3d 838, 845 (5th Cir. 1997) (holding by

Some jurisdictions have gone even further by allowing an affidavit to cure a deficient warrant, even where it is neither incorporated by reference in nor accompanying the warrant, as long as the "functional equivalent" of those requirements has been met.³² For example, the Seventh Circuit has held that "an affidavit supplying the requisite specificity . . . need not be physically appended to the warrant or explicitly incorporated by reference where the magistrate considered the affidavit in issuing the warrant and the officers complied with the affidavit when executing the warrant."³³ The circuit courts have clearly not reached a consensus as to how a warrant lacking particularity may be cured, and the Supreme Court has yet to provide an answer.

C. *Qualified Immunity*

1. Objective Standard of Reasonableness

Under the rule of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,³⁴ a citizen whose constitutional rights have been violated by a federal officer has the right to bring a private action for damages against that officer.³⁵ This right, however, is limited. In *Harlow v. Fitzgerald*,³⁶ the Supreme Court of the United States held that "government officials performing discretionary functions, generally are shielded from liability for civil

reference sufficient); *United States v. Washington*, 852 F.2d 803, 805 (4th Cir. 1988) (holding incorporation by reference or attachment sufficient).

32. See, e.g., *United States v. Bianco*, 998 F.2d 1112, 1117 (2d Cir. 1993) ("[W]e should not adhere to formal requirements of incorporation and attachment where as here, it is clear that the involved parties were aware of the scope of and limitations on the search."); *United States v. Gahagan*, 865 F.2d 1490, 1499 (6th Cir. 1989) (holding a search valid, notwithstanding the warrant failing to describe the property to be searched, where "the executing officer[] is the affiant who describes the property [to be searched] to the judge, and the judge finds probable cause . . . , and the search is confined to the [described] areas"); *United States v. Wuagneux*, 683 F.2d 1343, 1350-51, 1351 n.6 (11th Cir. 1982) (holding that an ambiguity in a warrant could be cured by an affidavit that is not incorporated by reference in nor attached to a warrant).

33. *United States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997).

34. 403 U.S. 388 (1971).

35. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001); see also 42 U.S.C. § 1983 (2000) (creating a federal action against state or local government actors violating a citizen's constitutional rights); Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 LA. L. REV. 449, 456-58 (1992) (providing an overview of 42 U.S.C. § 1983).

36. 457 U.S. 800 (1982).

damages insofar as their conduct does not violate *clearly established* statutory or constitutional rights of which a *reasonable person* would have known.”³⁷ In the context of a search, the Court later characterized the dispositive question as “whether the officers reasonably believed that the search they conducted was authorized by a valid warrant.”³⁸

In *Malley v. Briggs*,³⁹ the Supreme Court further defined the boundaries of objective reasonableness by describing the qualified immunity defense broadly as “provid[ing] ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁴⁰ In the same opinion, however, the Court limited the defense where a warrant application so lacks an “indicia of probable cause as to render official belief in its existence unreasonable,”⁴¹ notwithstanding a magistrate’s authorization of the search.⁴²

2. “Clearly Established” Right

In *Anderson v. Creighton*,⁴³ the Supreme Court of the United States reviewed an Eighth Circuit decision, the holding of which provided that an FBI agent was not entitled to qualified immunity because “the right to be free from warrantless searches of one’s home unless the searching officers have probable cause . . . was clearly established.”⁴⁴ The Court rejected this reasoning as too broad, holding that, while the *specific action* in question does not need to have been previously held unlawful, “[t]he contours of the right must be sufficiently clear that a reasonable official

37. *Id.* at 818 (emphasis added). The significance of *Harlow* was to establish a “wholly objective standard” of reasonableness when determining whether a government official is entitled to qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 191 (1984); see also Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 597–98 (1989). The Court later held qualified immunity provided “immunity from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

38. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984).

39. 475 U.S. 335 (1986).

40. *Id.* at 341.

41. *Id.* at 345.

42. *Id.* at 345–346 (citing *Unites States v. Leon*, 468 U.S. 897, 922 n.23 (1984)).

43. 483 U.S. 635 (1987). In this case, the plaintiffs alleged that an FBI agent, participating in a warrantless search of the plaintiffs’ home, lacked probable cause. *Id.* at 637–38.

44. *Id.* at 640.

would understand that what he is doing violates that right."⁴⁵ As the Supreme Court has continued to refine the "clearly established" standard,⁴⁶ there have been different interpretations in the lower courts,⁴⁷ as seen in the following cases.

The United States Court of Appeals for the Sixth Circuit in *Robinson v. Bibb*,⁴⁸ for example, stated that "[i]n order to be clearly established, a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court."⁴⁹ Frank Bibb was a police officer who had fatally shot William Taylor, who fled when Bibb identified himself as a police officer upon catching Taylor in the act of dismantling Bibb's car.⁵⁰ The incident occurred just four days after the Supreme Court of the United States ruled in *Tennessee v. Garner*⁵¹ that to shoot a fleeing suspect is a violation of the suspect's constitutional rights.⁵² Bibb argued in his defense that he could not reasonably be expected to be aware of a four-day-old ruling.⁵³ The Sixth Circuit ruled that Bibb's argument might have been convincing if not for the fact

45. *Id.* The Court has since reiterated that "a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (alteration in original).

46. See *Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."); *Wilson v. Layne*, 526 U.S. 603, 615-17 (1999) (holding that "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful," where there were no "cases of controlling authority in their jurisdiction at the time of the incident that clearly established the rule on which [the petitioners] seek to rely," nor a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

47. See, e.g., *Hobson v. Wilson*, 737 F.2d 1, 25-26 (D.C. Cir. 1984) ("It is not clear . . . how a court should determine well-established rights: should our reference be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing? . . . [H]ow broadly or narrowly defined is the right that must be well-established?").

48. 840 F.2d 349 (6th Cir. 1988).

49. *Id.* at 351.

50. *Id.* at 350.

51. 471 U.S. 1 (1985).

52. *Robinson*, 840 F.2d at 350. As the Court noted, in *Garner*, "the Supreme Court held for the first time that the use of deadly force in apprehending a nondangerous fleeing felon is a violation of the fourth amendment." *Id.* at 350 & n.1.

53. *Id.*

that the Sixth Circuit had already ruled two years prior, in *Garner v. Memphis Police Department*,⁵⁴ that it is unconstitutional to shoot a fleeing suspect.⁵⁵ The Sixth Circuit thus held that Bibb's defense failed because the right had been "clearly established" at the time of Taylor's shooting.⁵⁶

In *Harris v. Young*,⁵⁷ the United States Court of Appeals for the Fourth Circuit established a slightly more restrictive standard for "clearly established."⁵⁸ The court determined that, even if the Fourth Circuit had established a particular principle in a prior decision, the law may still not be considered "clearly established" where the decision was split.⁵⁹

Finally, the United States Court of Appeals for the Ninth Circuit, in *Wood v. Ostrander*,⁶⁰ alternatively articulated a very broad definition of "clearly established" by holding that, though no Supreme Court case and no Ninth Circuit case had established the law, a Seventh Circuit decision was sufficient to "clearly establish" the law where "it was likely . . . that [the Ninth Circuit] would have come to the same result."⁶¹

III. FACTS AND HOLDING OF *GROH*

In 1997, Agent Jeff Groh of the Bureau of Alcohol, Tobacco, and Firearms led a team of officers in a search of Joseph Ramirez's Montana ranch for illegal weapons.⁶² Prior to the search, Groh completed and delivered to the magistrate a warrant application,

54. 710 F.2d 240 (6th Cir. 1983).

55. *Robinson*, 840 F.2d at 351.

56. *Id.*

57. 718 F.2d 620 (4th Cir. 1983). This case involved an inmate alleging a violation of his constitutional rights for not receiving sufficient access to an adequate law library during his two and one-half years in jail. *Id.* at 621.

58. *See id.* at 624.

59. *Id.* ("It would not be fair to hold a state official liable for not fulfilling 'clearly established' obligations when a federal Circuit Court of Appeals was unable to unanimously decide the same issue [in a separate, prior action].").

60. 879 F.2d 583 (9th Cir. 1989). This case involved a claim brought by the female passenger of a car against a state trooper who she claimed arrested the intoxicated driver, impounded the car, and abandoned her in a high crime area, where she was subsequently raped after accepting a ride home from a stranger. *Id.* at 586.

61. *Id.* at 593-94.

62. *Groh v. Ramirez*, 124 S. Ct. 1284, 1287-88 (2004).

supporting affidavit, and warrant form.⁶³ Upon review of the documents, the magistrate signed the warrant, which recited his satisfaction that the affidavit established sufficient probable cause and "sufficient grounds existed for the warrant's issuance."⁶⁴ While the application and affidavit particularly described the things to be seized, the warrant did not.⁶⁵ Nor did the warrant incorporate by reference the list of things contained in the application.⁶⁶ In the section of the warrant asking for a description of the things to be seized, Groh mistakenly typed the description of Ramirez's home instead of the alleged weapons.⁶⁷

Groh claimed that he verbally described the things to be seized to Mr. and Mrs. Ramirez prior to the search, but the Ramirezes claim that Groh only spoke with Mrs. Ramirez and told her that the officers were looking for "an explosive device in a box."⁶⁸ After not finding any illegal weapons, Groh and the officers left, leaving only a copy of the warrant with Mrs. Ramirez.⁶⁹ No subsequent charges were filed against the Ramirezes.⁷⁰ After a request by the Ramirezes' attorney the following day for a copy of the application and affidavit, which were under court seal, Groh faxed him a copy of the page of the application listing the things to be seized.⁷¹

The Ramirezes subsequently sued Groh and the other officers under *Bivens* and 42 United States Code section 1983,⁷² alleging eight causes of action, including a violation of the Fourth Amendment.⁷³ The United States District Court for the District of Montana entered summary judgment for all defendants, finding

63. *Id.* at 1288.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* In the portion of the form requiring a description of the "person or property" to be seized, the warrant stated: "[T]here is now concealed [on the specified premises] a certain person or property, namely [a] single dwelling residence two story [sic] in height which is blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction." *Id.* at 1288 n.2 (alteration in original).

68. *Id.* at 1288 (quoting *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1026 (9th Cir. 2002)). Groh claimed that he "orally described the objects of the search to Mrs. Ramirez in person and to Mr. Ramirez by telephone." *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See *supra* notes 34-35 and accompanying text.

73. *Groh*, 124 S. Ct. at 1288-89.

that there was no constitutional violation and, even if there were a constitutional violation, all the defendants would be entitled to qualified immunity.⁷⁴ The United States Court of Appeals for the Ninth Circuit affirmed the judgment with respect to all defendants and all claims, except for Ramirez's Fourth Amendment claim against Groh.⁷⁵ The Ninth Circuit held that the search was unconstitutional because the warrant failed to describe particularly the things to be seized.⁷⁶ The court further held that the search team members were entitled to qualified immunity, but not Groh, the team leader.⁷⁷

The Supreme Court of the United States granted certiorari⁷⁸ and affirmed the Ninth Circuit's decision.⁷⁹ While the Court did not provide specific reasons for granting certiorari, it is clear that the case gave the Court an opportunity to address confusion among the lower courts regarding the cure of a warrant lacking in particularity⁸⁰ and regarding the "clearly established" requirement for asserting qualified immunity.⁸¹ Seven of the Justices, five in the majority opinion written by Justice Stevens and two in a dissenting opinion written by Justice Kennedy, agreed that the search was unconstitutional based on the warrant's failure to describe particularly the things to be seized.⁸² In a narrower five-to-four decision, the Court held that Groh was not entitled to qualified immunity because no reasonable officer leading a search could presume a warrant, which plainly did not comply with the particularity requirement, was valid.⁸³

74. *Id.* at 1289.

75. *Id.*

76. *Id.*

77. *Id.* The court of appeals determined that Groh was not entitled to qualified immunity for failing to read the warrant and satisfying himself that he understood the document's scope and limitations. *Id.* (citing *United States v. Leon*, 468 U.S. 897 (1984)).

78. *Groh v. Ramirez*, 537 U.S. 1231 (2003).

79. *Groh*, 124 S. Ct. at 1295.

80. *See Groh*, 124 S. Ct. at 1289–93; *supra* Part II.B.2.

81. *See Groh*, 124 S. Ct. at 1293–94; *supra* Part II.C.2.

82. *Groh*, 124 S. Ct. at 1293, 1295.

83. *Id.* at 1294–95.

IV. ANALYSIS OF THE *GROH* DECISIONA. *Majority Opinion*⁸⁴

1. When the Plain Lack of Particularity Is So Deficient, the Search Is Warrantless

Relying on the text of the Fourth Amendment itself, Justice Stevens first established that the warrant was plainly invalid for providing no description of the items to be seized.⁸⁵ The fact that the application adequately described those items was not sufficient, because the warrant did not incorporate by reference the description of the items in the application and the application did not accompany the warrant.⁸⁶ The majority distinguished the warrant in this case, one that did not describe any of the items to be seized at all, from one containing a "minor omission" or a "mere technical mistake or typographical error."⁸⁷ Thus, because the warrant was "so obviously deficient," the majority deemed the search to be "warrantless."⁸⁸

2. A Warrantless Search of a Defendant's Home Is Presumptively Unreasonable

Justice Stevens, based on a "firmly established . . . 'basic principle of the Fourth Amendment law,'" then affirmed the rule that, absent exigent circumstances, the warrantless search of a home is presumptively unreasonable.⁸⁹ The majority emphasized "'the right of a man to retreat into his own home and there be free from unreasonable government intrusion'" goes to "'the very

84. The majority opinion was written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 1287.

85. *Id.* at 1289. Justice Stevens noted that the Fourth Amendment's warrant clause clearly provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing . . . the persons or things to be seized." *Id.*

86. *Id.* at 1289-90 ("The Fourth Amendment . . . requires particularity in the warrant . . ."). The court cited *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), for the general rule that "a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Id.* at 988 n.5

87. *Groh*, 124 S. Ct. at 1290.

88. *Id.*

89. *Id.* at 1290-91 (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)).

core” of the Fourth Amendment.”⁹⁰ Thus, even where a search’s only defect is lack of particularity in the warrant, the presumption of being unreasonable applies.⁹¹

3. A Search Based on a Warrant Plainly Failing the Particularity Requirement Is Unconstitutional

Because there was no written assurance that the magistrate found probable cause for all the items in the application, Justice Stevens rejected Groh’s argument that the search was reasonable despite the warrant’s lack of particularity.⁹² Additionally, citing *United States v. Chadwick*,⁹³ Justice Stevens relied on the purpose of the particularity requirement of assuring the subject of the search of the limits of the executing officer’s power to search.⁹⁴ Therefore, the majority concluded that because the warrant so plainly failed the particularity requirement, “proceeding with the search was clearly ‘unreasonable’ under the Fourth Amendment,” and, thus, unconstitutional.⁹⁵

4. An Officer Leading Such a Search Is Not Entitled to Qualified Immunity

Having concluded that the search violated the Fourth Amendment, Justice Stevens then “turn[ed] to the question whether

90. *Id.* at 1290 (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001)).

91. *Id.* at 1291.

92. *Id.* Groh reasoned that the goals served by the particularity requirement were otherwise satisfied by a magistrate approving an application that contained the particular items to be seized and the scope of the search not exceeding the limits set forth in the application. *Id.*

93. 433 U.S. 1, 9 (1977) (“[A] warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.”).

94. *Groh*, 124 S. Ct. at 1292. While the majority acknowledged that the Fourth Amendment does not require the executing officers to serve the warrant on the owner prior to the search, the majority explicitly avoided deciding “[w]hether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when . . . an occupant of the premises is present and poses no threat to the officers’ safe and effective performance of their mission.” *Id.* at 1292 n.5. The Court also declined to consider whether Groh’s oral communication to the Ramirezés would have sufficiently fulfilled this purpose because the Ramirezés dispute the existence of the communication, and, on a summary judgment motion raised by Groh, all justifiable inferences were to be drawn in the Ramirezés’ favor. *Id.* at 1293.

95. *Id.* at 1293.

[Groh was] entitled to qualified immunity."⁹⁶ Relying on the standard set forth in *Saucier v. Katz*,⁹⁷ the majority first determined that "no reasonable officer could believe" that a warrant plainly not complying with the particularity requirement was valid.⁹⁸ Because Groh was the preparer of the warrant, the Court reasoned that he especially could not reasonably rely "on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized."⁹⁹ The majority also reemphasized that it was also a well-established rule that, absent exigencies or consent, warrantless searches of the home are presumptively unconstitutional.¹⁰⁰ Thus, it would be clear to a reasonable officer that proceeding with a search pursuant to a warrant that plainly fails the particularity requirement was unlawful.¹⁰¹ Therefore, ultimately seeking to protect the "substantive right" of the subject of a search to be assured "that a magistrate has duly authorized the officer to conduct a search of limited scope,"¹⁰² the majority denied Groh qualified immunity and affirmed the decision of the Ninth Circuit.¹⁰³

C. Justice Kennedy's Dissent¹⁰⁴

Justice Kennedy first agreed with the majority, providing little analysis, that the Fourth Amendment was violated in this case; however, he concluded that Groh was entitled to qualified immunity.¹⁰⁵ For Justice Kennedy, this case involved a "straightfor-

96. *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999)).

97. 533 U.S. 194, 202 (2001). The Court specifically looked at "whether the right that was transgressed was 'clearly established'—that is, 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Groh*, 124 S. Ct. at 1293 (quoting *Saucier*, 533 U.S. at 202).

98. *Groh*, 124 S. Ct. at 1293.

99. *Id.*

100. *Id.* at 1294.

101. *Id.* Here, the Court relied here on *United States v. Leon*, 468 U.S. 897 (1984), where the Court observed that "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Groh*, 124 S. Ct. at 1294 (quoting *Leon*, 468 U.S. at 923). The Court then concluded: "This is such a case." *Id.*

102. *Groh*, 124 S. Ct. at 1294–95 n.9.

103. *Id.* at 1295.

104. Justice Kennedy's dissent was joined by Chief Justice Rehnquist. *Id.*

105. *Id.* (Kennedy, J., dissenting). Regarding the Fourth Amendment violation, Justice Kennedy stated simply, "[t]he warrant issued in this case did not particularly describe the things to be seized, and so did not comply with the Fourth Amendment." *Id.* (Kennedy, J.,

ward mistake of fact.”¹⁰⁶ Based on a clerical error when filling out the warrant, Groh mistakenly believed that the warrant contained the proper language.¹⁰⁷ Justice Kennedy asserted that the majority misapplied *Leon* because “[t]his is a case about an officer being *unaware* of a clerical error, not a case about an officer *relying* on one.”¹⁰⁸ The pertinent question, therefore, was “whether an officer can reasonably fail to recognize a clerical error.”¹⁰⁹ Justice Kennedy argued that “[i]n the context of an otherwise proper search . . . , an officer’s failure to recognize his clerical error on a warrant form can be a reasonable mistake.”¹¹⁰

D. Justice Thomas’s Dissent¹¹¹

Justice Thomas first emphasized the need to address two separate questions involving any Fourth Amendment case: “whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless “reasonable” within the meaning of the first.”¹¹² The Justice argued that the Ramirezes received the protection of the Warrant Clause based on the magistrate reviewing the warrant application and the supporting affidavit, both of which clearly

dissenting).

106. *Id.* (Kennedy, J., dissenting).

107. *Id.* (Kennedy, J., dissenting).

108. *Id.* at 1297 (Kennedy, J., dissenting) (emphasis added). For the majority’s application of *Leon* to this case, see *supra* note 101. The majority determined the central question to be whether it was reasonable for an officer to rely on a warrant containing no description of the items to be seized. See *supra* note 98 and accompanying text. Justice Kennedy asserted that “[n]o one suggests that the officer reasonably could have relied on the defective language in the warrant,” but the officer was not aware of the defective language in this case. *Groh*, 124 S. Ct. at 1297 (Kennedy, J., dissenting).

109. *Groh*, 124 S. Ct. at 1296 (Kennedy, J., dissenting).

110. *Id.* (Kennedy, J., dissenting). Justice Kennedy relied in particular on *Malley v. Briggs*, 475 U.S. 335 (1986), and the “ample room” that case provided “for mistaken judgments.” *Groh*, 124 S. Ct. at 1298 (Kennedy, J., dissenting) (quoting *Malley*, 474 U.S. at 343). Also, Justice Kennedy reasoned that it was more natural that Groh would miss the clerical error because he was the preparer, given the difficulty sometimes in noticing one’s own errors. *Id.* at 1296 (Kennedy, J., dissenting).

111. Justice Thomas’s dissent was joined by Justice Scalia, and joined by Chief Justice Rehnquist as to Part Three, the qualified immunity portion of the dissent. *Groh*, 124 S. Ct. at 1298.

112. *Id.* at 1299 (Thomas, J., dissenting). “By simply treating this case as if no warrant had ever been sought,” Justice Thomas argued, “the Court glosses over what should be the key inquiry: whether it is always appropriate to treat a search made pursuant to a warrant that fails to describe particularly the things to be seized as presumptively unreasonable.” *Id.* (Thomas, J., dissenting).

specified the items to be seized, and then signing those documents without making any adjustments or corrections.¹¹³

Justice Thomas further determined that the search was reasonable because, notwithstanding "the technical defect in the warrant, it is hard to imagine how the actual search could have been carried out any more reasonably."¹¹⁴ As conceded by the majority, the Fourth Amendment does not require an officer to "serve the warrant on the searchee before the search."¹¹⁵ Thus, Justice Thomas reasoned that Groh's prompt delivery of the list of items to be seized the day following the search by request of Ramirez's attorney was sufficient.¹¹⁶

Even assuming the existence of a constitutional violation, Justice Thomas then argued that Groh was entitled to qualified immunity.¹¹⁷ For the Justice, Groh's "entitlement to qualified immunity . . . turn[ed] on whether his belief that the search warrant was valid was objectively reasonable."¹¹⁸ Justice Thomas asserted that it may be reasonable for an officer to believe that the warrant was valid, given the number of warrants officers prepare and execute in a given year and the sometimes detailed and comprehensive supporting documents required.¹¹⁹ Justice Thomas concluded that, in this case, short of proofreading the warrant, Groh could have done nothing more to ensure the reasonableness of the search, and thus, should be entitled to qualified immunity.¹²⁰

113. *Id.* at 1300-01 (Thomas, J., dissenting).

114. *Id.* at 1301 (Thomas, J., dissenting).

115. *Id.* (Thomas, J., dissenting).

116. *Id.* (Thomas, J., dissenting).

117. *Id.* (Thomas, J., dissenting).

118. *Id.* at 1302 (Thomas, J., dissenting). Justice Thomas argued that the majority defined the question on too general of a level. *Id.* (Thomas, J., dissenting).

119. *Id.* (Thomas, J., dissenting). Justice Thomas also relied on *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), in which the Court suggested that, unlike an officer not involved in the warrant application, an executing officer who is also the affiant might not need to read the issued warrant. *Groh*, 124 S. Ct. at 1302-03 (Thomas, J., dissenting) (citing *Sheppard*, 468 U.S. at 989 n.6).

120. *Groh*, 124 S. Ct. at 1303 (Thomas, J., dissenting).

V. IMPACTS OF THE *GROH* DECISIONA. *The Fourth Amendment Statutes of Warrantless Home Searches*

1. Is a Warrantless Search of a Home Per Se Unreasonable?

The first impact of this decision involves Fourth Amendment interpretation in general. Seven of the Justices effectively held that a home search, absent exigent circumstances or consent and pursuant to a judicially approved warrant containing *no* description of the items to be seized, was per se unreasonable.¹²¹ While finding a search conducted outside the judicial process to be per se unreasonable was not a novel holding,¹²² the holding in this case was more novel in that the search was not entirely outside the judicial process. The federal agent did obtain judicial permission for the search with a proper application and affidavit.¹²³ This case, therefore, had more to do with a federal agent mistakenly believing the warrant contained information that it did not contain,¹²⁴ rather than simply a federal agent not obtaining a judicially approved warrant at all. Because the majority opinion did not include any language holding the search in this case to be “per se unreasonable,”¹²⁵ it is unclear to what extent, if any, the Court intended to extend the per se rule from searches conducted “outside the judicial process” to searches conducted inside the judicial process, but which involved a facially deficient warrant by mistake.

121. While the Court did not use the words “per se,” the effect of the decision clearly fits this description as Justice Thomas correctly concluded that Groh “could have done nothing more to ensure the reasonableness of his actions than to proofread the warrant.” *Id.* (Thomas, J., dissenting).

122. See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (“Time and again, this Court has observed that searches and seizures “conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”” (quoting *Thompson v. Louisiana*, 469 U.S. 17, 19–20 (1984) (per curiam) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted)))).

123. See *supra* notes 63–65 and accompanying text.

124. See *supra* note 107 and accompanying text.

125. The majority opinion deemed the search presumptively unreasonable, rather than per se unreasonable. *Groh*, 124 S. Ct. at 1290–91.

The opinion did serve to clarify the Court's position regarding the warrant requirement.¹²⁶ Though some commentators have perceived the Rehnquist Court as favoring the use of a reasonableness test, rather than imposing a warrant requirement,¹²⁷ the Court made clear in this decision, at least in the context of a home search absent exigent circumstances or consent, that a warrantless search *is* unconstitutional.¹²⁸ This per se rule also particularly reinforces the Fourth Amendment's protection against arbitrary invasion of the home.¹²⁹

2. Particularity in the Actual Warrant: A Substantive Right

The next impact of this decision involves the strict interpretation of the particularly requirement by the Court. When determining whether a search is warrantless, a judicially approved warrant containing no description of the items to be seized is no better than a search with no effort to obtain any warrant at all.¹³⁰ Because of the substantive right of those subject to search to be assured of the judicially imposed limits on the search, the Court determined that a complete omission of the items to be seized could not be characterized as a technical mistake where no exi-

126. See generally *supra* note 12.

127. See, e.g., Maclin, *Complexity*, *supra* note 12, at 928 ("The Rehnquist Court favors reading the [Fourth] Amendment as simply requiring that all searches and seizures be reasonable, not that warrants must be obtained beforehand.")

128. It must be remembered, though, that this decision was based on a defendant's motion for summary judgment based on a qualified immunity defense. When considering the first inquiry regarding the qualified immunity issue—whether a constitutional violation has occurred—all justifiable inferences are to be drawn in favor of the injured party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[When] ruling on a motion for summary judgment . . . , [t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); see also *Saucier v. Katz*, 533 U.S. 194, 201 (2001) ("Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."). For additional analysis of *Groh*'s impact on the reading of a warrant requirement into the Fourth Amendment, see Timothy P. O'Neill, *'Two Ideas' a Lonely Camp; 'One Idea' a Majority*, CHI. DAILY L. BULL., Mar. 12, 2004, at 5.

129. This is consistent with the opinion in *Wilson v. Layne*, 526 U.S. 603 (1999), authored by Chief Justice Rehnquist, expressing in detail the Fourth Amendment's particularly strong protection against invasions of the home. *Id.* at 614–18. It is unclear to what extent, however, the Court will apply this per se rule to searches outside of the home.

130. Thus, if the warrant contains no description of the items to be seized, even if by mistake or technical error, an otherwise valid home search is unconstitutional, absent exigent circumstances or consent. See *supra* notes 91, 95, 101 and accompanying text.

gent circumstances existed in the course of obtaining the warrant.¹³¹

This holding, therefore, runs contrary to approximately half of the circuit courts, which have upheld a “functional equivalent” standard¹³² or an “incorporation by reference or attachment” standard,¹³³ regarding the particularity requirement. While not ruling on the issue, the majority did provide some guidance that it would be enough for these jurisdictions to adopt the incorporation by reference *and* accompaniment standard.¹³⁴ The practical impact of this finding places a burden on the executing officer to ensure that either the warrant contains a description of the things to be seized or the warrant incorporates by reference an affidavit that contains such a description, such that a judicially imposed limit exists in fact *and* in appearance.¹³⁵

Another potential impact highlighted, though not discussed in detail in the majority opinion, involves the display of the warrant to the subject of the search before commencing the search. While the majority admitted that the Fourth Amendment does not require an officer to serve the warrant prior to commencing the search, it specifically side-stepped answering “[w]hether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers’ safe and effective performance of their mission.”¹³⁶ Given the emphasis the majority placed on the substantive right of the subject of the search to be assured of the authority and scope of authority of the officer conducting the search,¹³⁷ this decision moves the Court closer to an affirmative answer to that question.

131. Groh v. Ramirez, 124 S. Ct. 1284, 1290 (2004).

132. See cases cited *supra* note 32 and accompanying text.

133. See cases cited *supra* note 31 and accompanying text.

134. See Groh, 124 S. Ct. at 1290; see also *supra* note 86 and accompanying text.

135. The majority characterized the burden as a “duty to ensure that the warrant conforms to constitutional requirements,” Groh, 124 S. Ct. at 1293 n.6, denying that it imposes a “novel proofreading requirement.” *Id.* Because Groh could not have made the search more reasonable, however, except by proofreading and having the magistrate correct the warrant, it is difficult to see this as anything but a proofreading requirement. The Court determined that it was irrelevant whether the judicially imposed limits factually existed, because without a written warrant particularly describing the items to be seized, the *appearance* of a judicially imposed limit would not exist. *Id.* at 1291.

136. *Id.* at 1292 n.5.

137. See *supra* note 102 and accompanying text.

B. *Restriction on Qualified Immunity*

Perhaps the greatest impact of this holding, though by a close five-to-four decision, was the narrowing of the qualified immunity defense for officers executing a search warrant.¹³⁸ First, this case provides an example of a warrant "so facially deficient" that the Court will deem presuming the warrant to be valid as unreasonable, as described in *Leon*.¹³⁹ The Court effectively held that, for such a warrant, neither a mistake of law, nor a mistake of fact, would be reasonable.¹⁴⁰ Thus, the Court also narrowed the *Sheppard* holding that "the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid,"¹⁴¹ by determining that *no* officer, absent exigent circumstances, could reasonably rely on a warrant with no description of the items to be seized to search a home.¹⁴²

The Court also narrowed the "clearly established" standard. Though over half of the circuit courts had held the "functional equivalent" or "mere accompaniment" standards to be constitutional,¹⁴³ and no Supreme Court decision based on analogous facts had existed,¹⁴⁴ the Court still held that the law requiring the warrant to be valid on its face was clearly established.¹⁴⁵ This case thus provides an example of a law being clearly established even though the specific action was not yet held unlawful by the Supreme Court nor by a majority of the circuit courts.¹⁴⁶ Therefore,

138. The Court's holding is limited to lead officers, not officers merely participating in the search. *Groh*, 124 S. Ct. at 1293 n.6.

139. *United States v. Leon*, 468 U.S. 897, 923 (1984) ("[D]epending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.").

140. As correctly asserted by Justice Kennedy, this case involved a mistake of fact, rather than a mistake of law. *See supra* notes 106–10 and accompanying text. The majority, however, focused on whether any reasonable officer would believe that a warrant providing no description of the things to be seized was valid, not whether any reasonable officer would mistakenly believe that the warrant provided a description of the things to be seized. *Groh*, 124 S. Ct. at 1293.

141. *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88 (1984).

142. *See supra* note 98 and accompanying text.

143. *See supra* notes 31–32.

144. *See Groh*, 124 S. Ct. at 1302 (Thomas, J., dissenting).

145. *See supra* note 101.

146. *See supra* note 45 and accompanying text.

an officer leading a home search pursuant to a warrant as facially deficient as the one in this case, with no description of the place to be searched for example, will less likely be entitled to qualified immunity after this case.

VI. CONCLUSION

The *Groh* decision stands to strengthen the particularity requirement and to weaken qualified immunity. The Court effectively implemented a *per se* rule regarding the particularity requirement, declaring that no reasonable officer would execute a warrant to search a home, absent exigent circumstances or consent, when that warrant contains no description of the items to be seized.¹⁴⁷ The *Groh* decision also opened officers to greater liability by raising the level of generality acceptable for the law to be “clearly established.”¹⁴⁸ The Court declared a law to be “clearly established” based on the text of the Fourth Amendment, even when circuit court opinions differed and no Supreme Court opinion based on analogous facts existed.¹⁴⁹

One impact of the *Groh* decision will be to proscribe the “functional equivalent” and “mere attachment” standards for curing a warrant lacking particularity.¹⁵⁰ Another impact will be to impose a proofreading requirement on lead officers executing warrants to ensure that the warrant contains a description of the items to be seized or incorporates by reference another document containing such a description.¹⁵¹ Finally, the Court has left several areas of confusion, true to Fourth Amendment jurisprudence, to be decided in future decisions, including the right to see the warrant prior to the search,¹⁵² the specific requirements necessary to cure a warrant,¹⁵³ as well as what other laws causing confusion among the circuit courts will be deemed “clearly established.”¹⁵⁴ While

147. See *supra* Part V.A.

148. See *supra* Part V.B.

149. See *Groh*, 124 S. Ct. at 1302 (Thomas, J., dissenting); see also *supra* notes 31–32, 45 and accompanying text.

150. See *supra* notes 31–32 and accompanying text.

151. See *supra* note 135 and accompanying text.

152. See *supra* notes 136–37 and accompanying text.

153. See *supra* notes 132–34 and accompanying text.

154. See *supra* notes 143–46 and accompanying text.

there may be disagreement as to whether the Court came to the correct conclusion in this case, the decision at least goes towards cleaning up the “mess” of Fourth Amendment law.

C. Brandon Rash

PREFACE

The famous French political observer, Alexis de Tocqueville once wrote, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."¹ Though de Tocqueville wrote those words almost 200 years ago, they apply more than ever today. Currently, the United States finds itself in an era of unprecedented judicial power. Federal courts increasingly exert their influence over all aspects of our society. As the power of the federal courts has increased, it is really no surprise that the judicial selection process has become increasingly contentious. In not so subtle terms, the political battles have shifted away from legislative battles towards who will sit on our courts, who will determine our moral ideology, and who will control our Constitution. Right or wrong, ultimately judges determine much of our societal framework. As former Chief Justice Charles Evans Hughes once said: "We are under a Constitution, but the Constitution is what the judges say it is."²

In the past few years, the Supreme Court of the United States has decided issues encompassing the right to privacy, homosexual sodomy, free speech, and even presidential elections. This doesn't even include the important decisions held by lower federal courts that never even reach the Supreme Court. Perhaps de Tocqueville said it best when he wrote that he was "not aware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans"³ and that "a more imposing judicial power was never constituted by any people."⁴

1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., 1980) (1945).

2. CHARLES EVANS HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 144 (David J. Danelski & Joseph S Tulchin eds., 1973).

3. DE TOCQUEVILLE, *supra* note 1, at 98.

4. *Id.* at 150.

Alexander Hamilton once described the judiciary as the "least dangerous" branch.⁵ It is interesting to wonder what he would think of the judiciary today.

I will leave the detailed analysis of federal judicial selection and judicial legitimacy up to the much better qualified experts in this book though I will end my analysis with one final de Tocqueville quote. De Tocqueville rather alarmingly summarized the importance of judicial selection by declaring that "if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war."⁶ While de Tocqueville's fears of anarchy and civil war may seem a bit extreme nowadays, hindsight proves that when he expressed those fears in 1835 they served as an amazing foreshadowing of the Supreme Court's *Dred Scott v. Sandford*⁷ decision in 1856 and the subsequent American Civil War.⁸ If nothing else, de Tocqueville's fears should remind us not to underestimate the importance of selecting who controls our judicial system.

With that said, on behalf of the *University of Richmond Law Review*, it is my pleasure to present the 2004 *Allen Chair* issue. This year marks the twelfth anniversary of the *Allen Chair* edition of the *Law Review* and focuses on the important issue of federal judicial selection.

On April 16, 2004, the University of Richmond School of Law, the University of Richmond Jepson School of Leadership, and the *University of Richmond Law Review* gathered leading experts on federal judicial selection for the Allen Chair Symposium. The annual Allen Chair Symposium serves as a forum for debate on specific issues of timely legal significance. The *Allen Chair* book is published by the *University of Richmond Law Review* several

5. THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them.").

6. DE TOCQUEVILLE, *supra* note 1, at 152.

7. 60 U.S. (19 How.) 393 (1856).

8. The *Dred Scott* decision ignited the already controversial slavery issue by holding that African-American slaves were property and that the property laws of a slave-free state could not grant slaves their freedom. This decision is widely considered to be one of the more unfortunate Supreme Court decisions and is frequently cited as an instigating factor in the ensuing American Civil War (1861–1865).

months after the Symposium and serves as its literary complement. As the authors within this book discuss, the issue of federal judicial selection has always been an important issue subject to political conflict. However, after recent years of contentious disputes in the Senate and dissolving civility in the selection process, the issue appears more important than ever.

The format of this book is organized into three sections. The first two, entitled "Symposium Articles" and "Symposium Essay," feature articles by many of the distinguished panelists from the Symposium.⁹ The authors of these articles represent academics, historians, and judges. They have all shaped judicial theory through their academic pursuits and preserved judicial history through their historical writings. One author currently serves as a distinguished member of our judicial system and provides first-hand knowledge of the selection process. Each of their articles serve as an important contribution to the judicial selection debate.

In the third and final section of this book, entitled "Remarks From the Senate," we are honored to have United States Senators John Cornyn and Richard Durbin provide their views on federal judicial selection. Both senators currently serve as members of the Senate Judiciary Committee and are thereby second only to the President of the United States in shaping our judicial system. Both senators have served distinguished and honorable careers in public service and are active participants in the judicial selection debate. In this book they continue their pursuit to resolve the problems surrounding judicial selection.

Specifically, Senator Cornyn provides three revised and updated articles that previously appeared in the *National Review Online*. They serve as an historical account of the ongoing debate and present one side of the various issues. Senator Durbin, in turn, has provided a response to Senator Cornyn's general arguments. The contributions of these senators is especially significant because our country was founded on the intelligent legal debate of public servants. The practice first started with our Founding Fathers in *The Federalist Papers* and similar publica-

9. Note that the entire Symposium can now be viewed online at <http://law.richmond.edu/news/media.htm> (last visited Jan. 22, 2005).

tions and continues today in modern media, newspapers, congressional debates, and in some cases student-edited legal journals. It is a tremendous honor for me and the entire *Law Review* to have these two senators participate in this issue.

The solution to the judicial selection problems may not be found in this book, and it may not occur anytime soon, though I am confident that the solution lies in intelligent debate of the issues and that these two senators will play prominent roles in both the debate and the solution.

Though the opinions of the various authors in this book may differ, each author has admirably contributed to an important issue, all the while patiently dealing with my constant editing and often terrible sense of humor. It has been an honor and a privilege to work with every one of these authors and it is my simple hope that they will be proud of this book and their contribution. More than anything else, I sincerely hope this book will serve as a positive contribution to the judicial selection discussion and compel others to join the debate.

Sean Patrick Roche
Allen Chair Editor
Richmond, Virginia

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First and foremost, this book would not have been possible without the generous support of the Allen family. Every year the Allen Chair Symposium and the subsequent *Allen Chair* book allow discussion and promote debate on important legal issues. Both the Symposium and the book are made possible by the generous endowment of the Allen family, a prominent Richmond family and loyal supporter of the Richmond area. In no small part, the altruism and philanthropy of the Allen family allow the *Law Review* to contribute to legal debate and we are grateful.

The authors deserve all the credit for the final product, and I take all blame for any mistakes that slipped through the cracks. The authors were not only remarkably patient with my editing and bad jokes, they also provided great articles which made my job that much easier. Throughout the course of putting this book together I talked to many of the authors on a regular basis. I believe these authors are not only distinguished members of our community, they are genuinely good people. Several of the authors taught me an incredible amount about research, writing, editing, and putting together a book. I consider them my friends and I am privileged to have worked with them.

My family and friends deserve thanks and an apology as my obsessive-compulsive work habits forced me into nerd-induced seclusion these last few months. My parents, Brien and Toni Roche, are the proud parents of eight children, of which I am the second-oldest and clearly their favorite. Though they have yet to pick up on my subtle hints to payoff my law school debt, they continue to spoil me and the rest of my brothers and sisters and we are immeasurably grateful.

Of my friends, Ryan, Kevin, Becky, and the “other” Sean deserve my gratitude for their support, attempts at humor, and remarkable resilience in rebounding from my steady stream of jokes and pranks. As for Becky, I can’t say enough. I love you and appreciate every day.

Professors Carl Tobias and Gary McDowell deserve all the credit for putting together an amazing symposium and gathering an amazing group of panelists. I owe these two professors a special debt of gratitude since many of the panelists they recruited also serve as authors in this book. They selected not only a diverse and interesting group of panelists, but a genuinely good group of people.

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